U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: OCT 18 2011

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a '[redacted]'. At the time she filed the petition, the petitioner was a postdoctoral research fellow at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and new witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on December 31, 2009. In a letter accompanying the initial submission, counsel stated:

> [The petitioner] is a cancer researcher and currently a neuroscientist of exceptional ability, focusing her research on colon-rectal cancer and neurodegenerative diseases such as spinal muscular atrophy (SMA) and amyotrophic lateral sclerosis (ALS) or

[redacted] [the

It is not clear how the petitioner can be "focusing her research on [redacted] and [redacted]" while, at the same time, she "specializes in investigating the [redacted]." Counsel established no overlap between those three areas of inquiry. The fact that the petitioner's research has involved three rather disparate areas of scientific inquiry as a graduate student and postdoctoral researcher suggests that her professors assigned these topics to her. There is no evidence of permanent "focus" or "specialization" that outlasts one particular graduate or [redacted]

Counsel asserted that "it takes more than minimum qualifications to succeed in her critical research projects." The petitioner cannot circumvent the job offer/labor certification requirement simply by claiming, through counsel, that the fundamental nature of her job requires traits beyond the "minimum" requirements. This argument relies upon a new, unstated definition of the word "minimum." If a researcher lacks the skills to perform satisfactory work, that worker is unqualified, not minimally qualified.

Counsel contended that the petitioner's "educational background and multidiscipline training in molecular biology, cellular biology and biochemistry is unlike any other as exemplified in her research work." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It may be true that no other researcher has followed the petitioner's exact research trajectory, but a fundamental purpose of scientific research is to address unanswered questions. Counsel did not show that doctoral students in the petitioner's field typically pursue redundant and unproductive research.

For that matter, counsel did not explain how the petitioner's past work with cancer of the lower intestinal tract and neurodegenerative diseases has left her better prepared for work with the origins of [redacted] in comparison to a researcher who has consistently studied [redacted] all along. Counsel simply declared the petitioner's preparation to be superior.

Counsel then described various research projects that the petitioner has undertaken, first as a graduate student and then as a postdoctoral trainee. Technical details about these projects describe their nature, but do not inherently establish their significance in comparison with the work of countless other graduate students and postdoctoral researchers undergoing training at well-regarded universities.

Counsel stated: "In total, [the petitioner] has published **8 publications** that have been cited **15 times** and is expected to publish more in the near future." Elsewhere, counsel clarified that the evidence shows "4 citations" of one article published in *Molecular Imaging and Biology* in 2006, and "11 citations" of a second article published in the *Journal of Nuclear Medicine*, also in 2006. The

petitioner submitted information showing that the impact factor of *Molecular Imaging and Biology* is 3.372, meaning that an article published in that journal saw, on average, 3.372 citations over the preceding two years. Four citations between 2006 and 2009 is below that average. The impact factor of the *Journal of Nuclear Medicine* is 6.662. A total of eleven citations between 2006 and 2009 appears to exceed that impact factor. Out of eight published articles, therefore, the petitioner documented one with above-average citations, one with below-average citations, and six with no claimed citations whatsoever.

It is important to examine the sources of the citations. All four of the citations of the article from *Molecular Imaging and Biology* are self-citations by the petitioner and/or her co-authors. Six of the eleven citations of the article from the *Journal of Nuclear Medicine* are, likewise, self-citations by the petitioner and/or the co-authors of the cited article. Self-citation is a common and accepted practice in scholarly publications, but it cannot show wider influence of the self-cited work. It shows only that the original research team continued to build on its earlier findings. The petitioner's own evidence shows that nine of the 15 documented citations are self-citations, leaving only six independent citations of one article.

Six witness letters accompanied the petition. [redacted], now an associate professor at the [redacted], stated:

> I know [the petitioner] for the last four years since she joined as a Post-Doctoral fellow in my laboratory in the Program in [redacted] . .
>
> [The petitioner] has great interest in neuroscience especially in understanding mechanisms of neurodegenerative disorders. [The petitioner] worked on understanding the molecular mechanisms of motor neuron degeneration in SMA [redacted] . . . SMA is characterized by the degeneration of the [redacted] cord motor neurons and muscle atrophy that lead to respiratory failure and death. At present, there is no treatment available for SMA.
>
> [The petitioner] contributed towards understanding the function of zinc-finger protein ZPR1 in the pathogenesis of SMA. . . . [The petitioner's] findings indicate that ZPR1 may be a potential modifier of SMA that can be used as [a] therapeutic target to design novel therapeutic strategies for the treatment of SMA. These findings are highly significant and will be published in one of the top ranking journals.

The petitioner submitted a letter signed by [redacted] The wording of the letter sometimes shows unusual grammar, such as the sentence: "The work was published in *Chinese Science Bulletin*, which is as similar as *Science* journal in United States here." The letter included technical details of the petitioner's work and indicated:

> [The petitioner] found that ZPR1 deficiency increased severity of SMA and decreased the life span of SMA mice. The results indicated that decreased ZPR1 expression may contribute to the SMA pathogenesis. . . . The identification of ZPR1 as a modifier gene that may contribute to SMA pathogenesis provides a foundation for the design of novel therapies for the treatment of severe SMA.
>
> Meanwhile [the petitioner] also participated in the ZPR1 conditional knock-out mouse generation based on cre-loxP system. This mouse becomes a very powerful research tool to enhance our understanding of the relationship between the pathogenesis of SMA and the alterations of ZPR1 function and ultimately to pave an avenue for drug discovery and invention of novel treatment to satisfy the unmet requirements from patients.
>
> Taken together, this research is original and very productive. [The petitioner] played a major role in this fantastic investigation and is going to publish paper [*sic*] in one of the top-ranking journals.

[redacted] letter did not identify the "top-ranking journal" or provide evidence that the journal had accepted the petitioner's paper(s) for publication. Without confirmation of acceptance, the assertion that a major journal "is going to publish [the petitioner's] paper" is mere speculation.

[redacted] research assistant professor at UMMS, stated:

> [The petitioner] had ever been involved in two major projects, one was focusing on the basic science to investigate the mechanisms of antisense-based molecular imaging of cancer; the other was more emphasizing the application to find out how to improve the transfection efficiency in vivo by using some novel transfectors. Both of these projects . . . require[] the use of high performance of liquid chromatography (HPLC).
>
> While working in [redacted] [the petitioner] worked very hard in these projects. . . . Two papers based on these two successful works have been published. I believe these experiences should be also beneficial to her subsequent endeavor and I am not surprised that she is becoming an excellent neuroscientist.

[redacted] stated:

> [The petitioner] worked in my laboratory for two years in the capacity of a postdoctoral fellow. Her research work was on ALS [amyotrophic lateral sclerosis] . . . . [The petitioner's] mission in my lab was to discover new ideas about how this untreatable disease begins. Some people with ALS have genetic mutations [in] a gene called copper-zinc superoxide dismutase (SOD1). This gene directs the production of a protein correspondingly called SOD1. The protein from this

> abnormal gene is also abnormal. [The petitioner's] task was to discover how this mutant SOD1 protein renders certain brain cells sick.

[redacted] explained that the petitioner genetically manipulated mice to produce a protein called DsRed in the [redacted] of their brain cells. In separate experiments "using cells grown in a dish," the petitioner "did critical experiments to show that mutant SOD1 associates with mitochondria," cellular structures that produce energy for the cell. [redacted] concluded:

> [The petitioner] has made huge contributions with very important impact. Taken together, [the petitioner's] work in my lab is very important for the further understanding of the disease-causing processes in ALS related to specific mitochondrial functions in different cell types. These findings could become the fundamental basis to develop new therapies to treat this world-wide fatal disease.

The remaining two witnesses showed no obvious, direct connection to the petitioner. [redacted] Center graduated from [redacted] a year before the petitioner arrived there in 1992, and therefore would not have had contact with her at that school. [redacted] described the petitioner's work in technical detail and stated:

> A long-standing question in major neurodegenerative disorders is called "selective vulnerability," which means the candidate susceptibility gene expresses in each cell in the whole human body but only elicits its devastating effects on certain neurons. After doing research on three [redacted] the petitioner] thinks the answer for this "selective vulnerability" stems in the process of neurodevelopment and neural differentiation. And [redacted] is a major [redacted] Her present research focusing on [redacted] can uncover some fundamental mechanisms controlling the basic functions of human brain and ultimately to discover and/or develop novel treatment strategies for neurodegenerative and neurodevelopment disorders.

[redacted] did not indicate that the petitioner's "present research" has already revealed "fundamental mechanisms controlling the basic functions of [the] human brain"; he claimed only that the petitioner's work "can" do so.

[redacted] director of the Center for [redacted] stated:

> [The petitioner's] research on neuroscience is always focusing on the very devastating and costly neurological diseases. . . . Her research on SMA first identified a modifier gene which becomes the "target" for drug discovery. The work is going to be published in a top-tier journal. . . . Her research will have the potential to pave a novel avenue to invent or discover more effective therapeutics to [schizophrenia].

Like [redacted] did not identify the "top-tier journal" said to be on the verge of publishing the petitioner's work. The petitioner did not submit any evidence of the acceptance or imminent publication of an article relating to her work with schizophrenia.

On February 22, 2010, the director requested additional evidence to establish the significance and influence of her research work. The director noted that nine of the petitioner's originally claimed citations were, in fact, self-citations that did not establish wider impact.

In response, counsel stated that citations are not the only possible measure of a researcher's impact. This is true, as far as it goes, but in the absence of a consistently strong citation history, the petitioner must provide alternative evidence that is at least as persuasive as independent citations. Counsel stated that the petitioner's "publications are fairly new and thus it will take time for her work to circulate and for others to cite her work." The petitioner must establish existing impact. It cannot suffice for the petitioner to speculate that evidence of that impact will eventually surface. If not enough time has passed for that impact to show, then the proper conclusion is that the petitioner filed the petition prematurely.

The petitioner submitted examples of her "actual work results," in the form of illustrations and graphs. These materials show that the petitioner has undertaken productive work in her chosen field, but they cannot self-evidently show their own importance or impact.

The petitioner also submitted two additional witness letters, both from [redacted] stated: "I have known [the petitioner] for over a year, during which she has been a postdoctoral fellow in my lab. [The petitioner's] work in my lab is focusing on schizophrenia." [redacted] stated that the petitioner "has some initial preliminary data from one experiment," which, "if replicated, extended, and substantiated, may enhance our understanding [of] the pathogenesis of this mysterious and important disease." It is the petitioner's responsibility to establish the significance of the results from "one experiment" that have not yet been "replicated, extended [or] substantiated."

[redacted] stated that the petitioner's work in [redacted] laboratory "is a very promising project that will provide important information toward our understanding of disease mechanism." Like [redacted] was tentative in his description of the petitioner's results, focusing instead on the petitioner's "plan" for future investigation.

The director denied the petition on July 9, 2010. The director acknowledged the intrinsic merit and national scope of the petitioner's area of research, but found the witness letters to be "generically complimentary." The director concluded that the witnesses had not demonstrated that the petitioner's work prior to the filing date had any particular impact on her field. The director gave little weight to witnesses' assertions that important papers by the petitioner will eventually appear in important, but unnamed, journals.

On appeal, the petitioner asserts that the director relied too heavily on citation figures, and disregarded "numerous other facts on the record demonstrating impact through [the petitioner's] original contributions, high-quality publications, and recognition by international experts in her field." Originality and importance are not synonymous, and in the absence of citation evidence, the petitioner must prove equally persuasive objective evidence of the quality of her publications. With respect to "recognition by international experts," most of the witnesses have worked directly with the petitioner and their statements do not show that the petitioner has produced significant, influential results in the area that she intends to pursue in the future. The few letters that directly addressed her latest work on schizophrenia did so in very general and tentative terms.

Counsel contends that one of the petitioner's discoveries "can be used in groundbreaking new treatments for sever[e] Spinal Muscular Atrophy." The record does not identify any "groundbreaking new treatments" for that condition, and the witnesses had indicated that no such treatments exist. The assertion that the petitioner's past work is bound to form the foundation of future treatments is mere conjecture. Even if time eventually shows this confident prediction to be entirely justified, the director must rely on the evidence in the record, not expectations of future events. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner submits two new letters on appeal, both from prior witnesses at UMMS. A new letter signed by [redacted] repeats counsel's assertion that the petitioner's "publications in the field of neuroscience are fairly new," and claims that the petitioner's "research results have benefited thousands of patients and their families in clinic." The record contains no documentary evidence to support this claim.

[redacted] identified three of the petitioner's claimed contributions, stating that the petitioner identified proteins that "can be used potentially as tumor markers for timely diagnosis" of higher [redacted]; "has developed an assay of the DNA repair system useful to the diagnosis of a type of" colorectal cancer; and has "show[n] that molecular imaging by antisense mechanism is feasible. . . . This is an important step toward cancer diagnosis at gene level." Referring to the assay mentioned in the second example, [redacted] stated: "Six years later after the publications, this assay helped several scientists in their investigations." As examples, [redacted] provided partial names of a researcher in [redacted] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought.

Id. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Many of the letters in the record consist of a description of the petitioner's past work, with general assurances that this work will eventually prove valuable after other researchers have used it to develop new tests or treatments. Other letters indicate that the petitioner's past work with cancer and neurodegenerative diseases leads the witnesses to conclude that the petitioner will eventually achieve comparable results in her current work on schizophrenia. A common thread is speculation about the petitioner's eventual impact, as opposed to demonstrable, present impact.

The AAO notes that the two letters submitted on appeal, supposedly written by two different witnesses, contain very similar passages. The letter signed by [redacted] included this sentence: "We are living in what is called 'post-genomic era,' and are poised to benefit from the human genomic project." [redacted] letter contains an almost identical passage: "As everybody knows, we are entering in what is called 'post-genomic era' and we are poised to benefit from the human genomic project." The AAO also notes grammatical anomalies (such as missing articles and incorrect prepositions) in both of the letters attributed to the [redacted]. These anomalies and shared passages cast doubt on the actual authorship of the letters. Because the petitioner's claim rests almost entirely on those letters, the issue is not a trivial one.

Counsel began the proceeding with a fair degree of emphasis on the petitioner's citation record, but dropped the issue after the director's observation that most of the citations are self-citations. Only at that point did counsel attempt to minimize the importance of citations. It remains that, without those citations, the petitioner must provide other evidence of comparable value. For reasons discussed above, the petitioner's witness letters do not have the same value, leaving the petition without strong, persuasive support.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.